

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of A. C. HEINZE, Minor.

UNPUBLISHED
December 12, 2013

No. 315821
Cheboygan Circuit Court
Family Division
LC No. 11-008217-NA

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the child at issue under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), MCL 712A.19b(3)(c)(ii) (other conditions exist), MCL 712A.19b(3)(g) (failure to provide proper care or custody), MCL 712A.19b(3)(h) (imprisonment for period that child will be deprived normal home), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). For the reasons set forth in this opinion, we affirm.

On October 7, 2011, the seven year old minor child was removed from the home of respondent and his wife, the child's mother, after police discovered that they were manufacturing and using methamphetamine. Respondent and his wife were charged with various drug crimes and the child was placed in foster care during the pendency of these proceedings which lasted over a year. On October 23, 2012, respondent was sentenced to three years and nine months' to twenty years' imprisonment. His earliest release date is in July 2016. The child's foster-care workers discovered that he was severely troubled. He acted out sexual behavior and talked about sex often. The child stated that when he lived with his parents, he had viewed pornography. His psychologist stated that his interest in sex was unnatural for a child his age. The child had trouble controlling his bowels and smeared his feces on walls. After being placed in foster care, the child began to make improvements in these behaviors. However, he regressed when he visited his parents. In addition, the child's psychologist, therapist, and foster-care workers stated that he needs a permanent living situation and that leaving open the possibility that respondent could reenter his life following his incarceration would be damaging to him.

After hearings were held, the trial court found that each statutory ground for termination alleged had been established by clear and convincing evidence and that termination was in the

child's best interests. Accordingly, it terminated respondent's parental rights to the child.¹ Respondent argues that the trial court erred in finding that the statutory grounds for termination were established and that termination was in the best interests of the child.

We review for clear error a trial court's determination that statutory grounds for termination have been established by clear and convincing evidence, *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009), as well the court's determination that termination of parental rights is in the best interests of the child, *In re Rood*, 483 Mich at 91; *In re Moss Minors*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Rood*, 483 Mich at 91 (citation omitted).

We find that the trial court did not clearly err in determining that MCL 712A.19b(3)(g), MCL 712A.19b(3)(h), and MCL 712A.19b(3)(j) were established by clear and convincing evidence. We do find that the trial court clearly erred in determining that MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(c)(ii) were established, but because only one statutory ground is required to terminate parental rights, the trial court's errors were harmless. *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012). We will only address the court's findings with respect to §§ 19b(3)(g), (h), and (j).

MCL 712A.19b(3)(g), (h), and (j) provide as follows:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Prior to the initiation of this case, respondent and his wife were making and using methamphetamine in their house while the child was present. The child was permitted to view inappropriate television shows and had viewed pornography. When the child was removed from respondent's home, he was highly "sexualized," could not control his bowels, and smeared his

¹ The parental rights of respondent's wife were also terminated. She has not appealed.

feces on walls. In short, he was a severely troubled child as a result of the home that respondent and his wife had made for him. Currently, respondent is unable to provide for the child because he is incarcerated. See *In re Huisman*, 230 Mich App 372, 385; 584 NW2d 349 (1998), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich 342, 353 n 10; 612 NW2d 407 (2000).

Respondent argues that he fully complied with his service plan and his parental rights were termination improperly due to his incarceration. It is true that a “parent’s compliance with the parent-agency agreement is evidence of [his] ability to provide proper care and custody.” *In re JK*, 468 Mich 202, 214; 661 NW2d 216, 223 (2003) (emphasis omitted). However, such compliance is only evidence, not conclusive. In this case, respondent’s incarceration prevents him from providing proper care and custody.

In addition, there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the child’s age. The child is now nine years old. Respondent will be incarcerated at least until July 2016. The child’s psychologist, therapist, and foster-care workers testified at the termination hearing that the child requires permanence and leaving open the possibility of reintroducing respondent into his life sometime in the future would be damaging to his progress. We conclude that the court did not err in finding that MCL 712A.19b(3)(g) was proven.

In *In re Mason*, 486 Mich 142, 160-161; 782 NW2d 747, (2010), our Supreme Court made clear that termination is proper under MCL 712A.19b(3)(h) only if all three elements of that section are established. The second and third elements have been established under MCL 712A.19b(3)(g). *In re Mason*, 486 Mich at 164-165. This leaves only the first element unaddressed. Respondent will be incarcerated until at least July 2016, exceeding the two-year threshold. Thus, unlike the trial court in *Mason* which waited until the respondent had less than two years to be eligible for parole, the trial court did not clearly err in finding that this statutory ground had been established.

The trial court also did not clearly err in finding that clear and convincing evidence supported termination of respondent’s parental rights under MCL 712A.19b(3)(j). Prior to the initiation of this case, testimony revealed that respondent did not adequately supervise the child. The child viewed television shows inappropriate for children his age as well as pornography. As a result of the home environment created by respondent and his wife, likely out of negligence due to their drug use, the child was severely troubled. He was highly “sexualized” and had trouble controlling his bowels and smeared his feces on walls. Additionally it was noted that respondent did little to alleviate the minor child’s anxiety over certain issues. Given respondent’s incarceration, it was very difficult to know if respondent could or would develop proper parenting skills. However, following placement, the child began to make improvements in these behaviors. However, when he visited his parents he regressed into his former bad behavior. Such observations led the child’s psychologist, therapist, and foster-care workers to testify yet again that the minor child needs permanence and that leaving open the possibility that respondent could reenter his life following his incarceration would be damaging to him. Thus, the trial court did not clearly err in finding that based on respondent’s conduct the minor child would likely be harmed if returned to respondent.

Respondent additionally argues that the trial court erred in terminating his parental rights because it was not in the child's best interests. After a trial court determines that one or more statutory grounds for termination exist, it must find that termination is in the best interest of the child. MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted).²

The trial court did not clearly err in finding that termination was in the child's best interests. It was clear from the testimony of the minor child's foster care workers and therapists that the minor child had little connection to respondent. Rather than be concerned with when respondent would be returning, the minor child focused on where he would live. While the minor child expressed affection for respondent, it was clear from the testimony that the bond between respondent and the minor child was not strong. As the trial court found, "...he's [the minor child] not attached; doesn't ask when to see [them] next, doesn't ask about them." Additionally it was clear that the failure by respondent to adequately parent the minor child had led to behavioral issues and caused the minor child to be years behind his peers in both school and social skills. Additionally, respondent's failures as a parent led to the minor child needing years of therapy. Hence, this Court finds that the facts which supported termination under the statutory grounds also support the court's best-interest finding.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

² We also note that respondent relies on *In re Mason*, 486 Mich at 164 for the argument that the trial court should have considered respondent's half-sister as a potential for placement. However, the minor child was not living with the relatives at the time of the termination hearing. Additionally, the relatives wanted to adopt the minor child rather than be guardians until respondent was released from prison. Adoption required the termination of the parental rights of respondent and his wife before it could be effectuated. *In re Handorf*, 285 Mich App 384, 387; 776 NW2d 374 (2009). Thus, the holding in *Mason* on this issue was inapplicable to this case.